Supreme Court of the United States,

OCTOBER TERM, 1904.

THE MADISONVILLE TRACTION COMPANY, . . *Appellant*,

vs.

THE SAINT BERNARD MINING COMPANY, . . *Appellee*.

MOTION.

The appellant, the Madisonville Traction Company, moves the court to advance this cause for hearing and decision, under Rule 32 of this court, on the ground that the only question in issue is the question of the jurisdiction of the court below.

BRIEF ON MOTION.

The appellant, the Madisonville Traction Company, hereinafter called the Traction Company, is a Kentucky corporation, with corporate power to build a line of railroad, and operate cars thereon, with electricity as the motive power.

The appellee, the Saint Bernard Mining Company, hereinafter called the Mining Company, is a Delaware corporation, owning a large tract of land in Hopkins County, Kentucky, and carrying on the business of mining coal therefrom.

The projected line of railroad of the Traction Company runs through the lands of the Mining Company, and the Traction Company, being unable to agree with the Mining Company for the acquisition of the needful right of way, instituted condemnation proceedings in the Hopkins County Court, seeking to condemn a defined portion of the lands of the Mining Company as a right of way for the railroad.

These proceedings were instituted in accordance with the statute laws of Kentucky providing for the condemnation of private property for railroad uses. The statutes of Kentucky providing for the condemnation of private property for railroad uses are appended to this brief.

Commissioners were appointed by the Hopkins County Court, who duly returned their report and appraisement of damages. Upon the filing of this report by the commissioners in the County Court, a summons was issued against and served on the Mining Company, warning it to appear in the County Court and show cause why the report of the commissioners should not be confirmed. Thereupon the Mining Company filed a petition in the County Court for the removal of the proceedings into the Circuit Court of the United States for the Western District of Kentucky on the ground of diverse citizenship. The County Court denied the petition, but approved the bond tendered by the petitioner.

The Mining Company duly filed in the United States Circuit Court for the Western District of Kentucky a complete transcript of the proceedings in the Hopkins County Court on the first day of its November term, 1903, at Owensboro.

Thereafter, on the second day of January, 1904, the Mining Company filed a bill in equity against the Traction Company, setting out the proceedings in the Hopkins County

Court, including the proceedings on its petition for removal, and alleged that the Traction Company, notwithstanding the petition for removal, intended to prosecute the proceedings in the Hopkins County Court, and complainant prayed an injunction against the Traction Company enjoining and restraining it from further prosecuting or causing to be prosecuted the proceedings in the Hopkins County Court, and from taking any steps or orders or making any motions, and from appearing in the Hopkins County Court in any way in said proceedings. Upon this bill a preliminary injunction was granted. (Bill, R., p. 1.) The Traction Company filed a demurrer to the bill, the ground of which is that the court is without jurisdiction or power to grant the injunction prayed for in the bill, or to grant any other or like relief. (R. R. 19-20.) The jurisdiction of the court below rests on the proposition that the condemnation proceedings in the Hopkins County Court are transferable directly to the Circuit Court of the United States.

The case came on for hearing on the demurrer to the bill, and the judgment of the Circuit Court was that the demurrer be overruled.

There was heard and determined at the same time a motion to remand the condemnation proceedings to the County Court, which motion was also, at the same time, overruled. (R. R. 20-21.)

The Traction Company, standing by its demurrer and failing to answer, a final decree was entered on the 26th of July, 1904, granting a perpetual injunction, as prayed for in the bill, and this appeal is from that decree. In the decree the following certificate was made by the judge of the court:

> "The court certifies and states that one issue considered and adjudged upon the demurrer to the bill of complaint

and upon the final hearing of the cause was whether the court had jurisdiction of this action, or to grant the relief prayed for by the complainant, or any part of it. The court held that it had jurisdiction to grant the relief herein adjudged, and the question of jurisdiction alone is now certified under the act of Congress to the Supreme Court of the United States for decision." (R. R. 27-28.)

Respectfully submitted,

DAVID W. FAIRLEIGH,

Counsel for Appellant.

APPENDIX.

KENTUCKY STATUTES.

CONDEMNATION OF LAND.

SECTION 835. When any company authorized to construct a railroad shall be unable to contract with the owner of any land or material necessary for its use for the purpose thereof, it shall file, in the office of the clerk of the County Court, a particular description of the land and material sought to be condemned, and may apply to the County Court to appoint commissioners to assess the damages the owner or owners thereof may be entitled to receive, and thereupon the said court shall appoint three impartial housekeepers of the county who are owners of land, and who shall be sworn to faithfully and impartially discharge their duties under this law.

SEC. 836. It shall be the duty of said commissioners to view the land and material, and to award to the owner or owners the value of the land or material taken, which shall be stated separately; and they shall also award the damages, if any, resulting to the adjacent lands of the owner, considering the purposes for which it is taken; but shall deduct from such incidental damages the value, if any, of the advantages and benefits that will accrue to such adjacent lands from the construction and prudent operation of the railroad proposed to be constructed. They shall return a report, in writing, to the office of the clerk of said court, stating their award, and

shall describe, in their report, the land and material condemned, give the names of the owners, and whether non-residents of the State, infants, of unsound mind, or married women.

SEC. 837. Upon the application of said company, and upon filing such affidavits, as may be necessary, the clerk of said court shall issue process against the owners to show cause why the said report should not be confirmed, and shall make such orders as to non-residents and persons under disability as are required by the Civil Code of Practice in actions against them in the Circuit Court.

SEC. 838. At the first regular term of the County Court, after the owners shall have been summoned the length of time prescribed by the Civil Code of Practice before an answer is required, it shall be the duty of the court to examine said report, and if it shall appear to be in conformity to this law, and to the extent that no exceptions have been filed thereto by either party, it shall confirm said report as against the owners not excepting.

SEC. 839. When exceptions shall be filed by either party, the court shall forthwith cause a jury to be empaneled to try the issues of fact made by the exceptions, and each juror shall be allowed one dollar per day for his services, to be taxed as cost. In assessing the damages the jury shall be governed by the rule prescribed in Section Eight Hundred and Thirty-six of this law, and, upon the request of either party, may be sent by the court, in charge of the sheriff, to view the land or material. If sufficient cause be not shown for setting aside the verdict, the court shall render judgment in conformity thereto, and shall make such orders as may be proper for the conveyance of the title upon the payment of the damages assessed. Either party may appeal to the Circuit Court, by executing bond as required in other cases, within thirty days, and the appeal shall be tried *de novo*, upon the conformation of the report of the commissioners by the County Court, or the assessment of damages by said court, as herein provided, and the payment to the owners of the amount due, as shown by the report of the commissioners when confirmed, or as shown by the judgment of the County Court when the damages are assessed by said court, and all cost adjudged to the owner, the railroad company shall be entitled to take possession of said land and material, and to use and control the

same for the purpose for which it was condemned as fully as if the title had been conveyed to it. But when an appeal shall be taken from the judgment of the County Court by the company, it shall not be entitled to take possession of the land or material condemned until it shall have paid into court the damages assessed and all costs. All money paid into court under the provisions of this law shall be received by the clerk of the court and held subject to the order of the court, for which he and his sureties on his official bond shall be responsible to the persons entitled thereto.

SEC. 840. The appeal from the County Court shall be taken by filing with the clerk of the court to which the appeal lies a statement of the parties to the appeal, and a transcript of the orders of the County Court, and thereupon the said clerk shall certify to the clerk of the County Court that said appeal has been filed, and the clerk of the County Court shall immediately transfer the original papers to the clerk of the court to which the appeal is pending; and if the owner on his appeal shall fail in the Circuit Court to increase the amount of damages awarded in the County Court, he shall pay all the costs of the appeal; if the damages are increased in the Circuit Court, the other party shall pay all the costs of the appeal. The same rule as to payment of costs shall apply when the appeal is prosecuted by the party seeking to condemn land.